




SO ORDERED.

SIGNED this 6th day of December, 2016.

  
LENA MANSORI JAMES  
UNITED STATES BANKRUPTCY JUDGE

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UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION

In re:

Jimmy L. Nicholson and  
Vicki L. Nicholson,

Debtors.

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Case No. 09-50207  
Chapter 13

**ORDER DENYING MOTION TO REOPEN**

THIS MATTER came before the court for hearing on November 22, 2016, after due and proper notice, upon the verified Motion to Reopen Case ("Motion") filed by Jimmy L. Nicholson and Vicki L. Nicholson (the "Nicholsons"). The Nicholsons appeared *pro se*, Franklin Greene appeared on behalf of Santander Bank, N.A. ("Santander"), Robert E. Price, Jr. appeared on behalf of the Bankruptcy Administrator, and Kathryn Bringle, Standing Chapter 13 Trustee, appeared. After careful review of the record and the arguments of the Nicholsons and of counsel, the court finds and concludes as follows:

## FACTS

The Nicholsons filed a petition under Chapter 13 of the Bankruptcy Code on February 3, 2009. On their schedules, the Nicholsons listed an interest in real property<sup>1</sup> with a value of \$43,300.00 subject to a mortgage with Sovereign Bank, now Santander,<sup>2</sup> and a second mortgage with Citifinancial. On February 26, 2009, Santander filed a proof of claim in the amount of \$58,565.88, with copies of a note dated January 25, 2002 in the original principal amount of \$53,100.00 and deed of trust also recorded on January 30, 2002 in Book 2229, Page 1836, in Forsyth County, North Carolina (“Deed of Trust”).

On April 23, 2009, the Nicholson’s plan was confirmed, with Santander’s mortgage to be paid by the Trustee as a continuing long term debt pursuant to 11 U.S.C. § 1322(b)(5) and its arrearage claim paid in full, and Citifinancial’s mortgage classified as unsecured due to a lack of equity in the real property. On March 6, 2010, the Nicholsons filed an adversary proceeding (AP No. 10-6008) against Citifinancial. In their complaint, the Nicholsons specifically alleged that Santander held a senior mortgage on their real property by virtue of the Deed of Trust filed in Forsyth County in Book 2229, Page 1836, and that the value of Santander’s mortgage as set forth in its proof of claim in the amount of \$58,565.88 was more than the value of their home. Because the amount of Santander’s

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<sup>1</sup> The real property was not identified on Schedule A or Schedule D by street address, though from subsequent documents the real property is known to be 2337 Konnoak View Drive, Winston-Salem, NC 27127.

<sup>2</sup> Sovereign Bank shall hereinafter be referred to as “Santander.”

mortgage was greater than the value of their real property, the Nicholsons requested that the court find Citifinancial's junior mortgage completely unsecured. On April 26, 2010, the court entered judgment in favor of the Nicholsons, finding Citifinancial's junior mortgage completely unsecured and ordering that its mortgage be cancelled upon the granting of the discharge.

The Nicholsons made regular plan payments to the Trustee, and on September 10, 2013, the Trustee filed a notice of final cure mortgage payment stating that the Nicholsons had fully paid the arrearage owed to Santander, and that the Nicholsons were current on payments. On October 10, 2013 the Trustee filed a motion to deem mortgage account current asserting that Santander perfected its lien on the Nicholsons' real property by recording the Deed of Trust at Book 2229, Page 1836, that all prepetition and postpetition defaults were cured, and that Santander be required to credit payments beginning November 2013 to monthly payments due beginning November 2013. The motion was noticed to both the Nicholsons and Santander. No objections were filed and the court entered an order granting that motion on November 18, 2013. On November 21, 2013, the Trustee filed a notice of completion of plan, and five days later the Nicholsons filed their motions for entry of discharge and certification regarding plan completion. On January 2, 2014, the Nicholsons received their Chapter 13 discharge, and the case was closed on February 26, 2014.

In early 2014, Trustee Services of Carolina, through representation by Brock & Scott, PLLC, was engaged by Santander to foreclose upon the Nicholsons' real property, and filed Case No. 14 SP 1836 in the Superior Court of Forsyth County. On April 7, 2015, the Clerk of Court of Forsyth County held a hearing pursuant to N.C. Gen. Stat. § 45-21-16(d) and entered an order allowing a foreclosure sale. Notice of sale was posted, giving the Nicholsons 10 days to file an appeal.

In lieu of filing an appeal, the Nicholsons filed an administrative complaint with the North Carolina Department of Justice ("NCDOJ"), alleging that the Deed of Trust on which Santander's foreclosure action was based incorrectly identified the Nicholsons' residence as Block 708, an adjacent property to the Nicholsons' real property at Block 709. The NCDOJ sent a letter on April 29, 2015 asking that the foreclosure be forestalled while the Nicholsons' claim was investigated. Brock & Scott as attorney for Trustee Services of Carolina dismissed the foreclosure proceeding and withdrew as the attorney of record, and on August 17, 2015 sent a letter to the NCDOJ arguing that the North Carolina courts were the appropriate arbiters of the validity of the Deed of Trust. On September 1, 2015, the NCDOJ responded, stating that the Nicholsons' "complaint on file with our office does not preclude your office from taking what actions you feel are necessary." (Docket No. 103, Exhibit K).

On September 2, 2015, the Nicholsons filed a *pro se* complaint in U.S. District Court for the Middle District of North Carolina against Brock & Scott, Santander, and Freddie

Mac (the investor in the loan), alleging violations of the Federal Debt Collection Practices Act ("FDCPA"), various state common law torts, and seeking declaratory judgment that the Deed of Trust did not attach to the real property. All defendants moved to dismiss the claims pursuant to Rule 12(b)(6), and oral arguments were heard on August 4, 2016. The FDCPA claims were dismissed against all defendants, and the remaining state law claims were dismissed for lack of subject matter jurisdiction.

On October 21, 2016, Santander mailed the Nicholsons a letter informing them of Santander's intent to foreclose on the property. The Nicholsons corresponded by email with counsel for Santander before filing the instant Motion.

On October 28, 2016, the Nicholsons filed the instant Motion seeking to (1) reopen their bankruptcy case, (2) reappoint the Trustee, (3) avoid judicial liens entered against their real property held by Santander, and (4) request that all monies paid on Santander's mortgage claim be returned. The Nicholsons argue that the Deed of Trust is invalid due to an error in correctly identifying the tax block number.<sup>3</sup>

The BA objects to the Nicholsons' Motion, arguing that state court is the proper forum to address the legal issues implicated in the Motion, with clear jurisdiction over the claims. The BA also argues that the lien in question is consensual, not judicial, and thus there is no judicial lien to avoid. Finally, the BA argues that granting effective relief by

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<sup>3</sup> Among other identifying information, the street address, the reference to the book and page number for the deed of the prior owners of the real property, and the plat book and page number are correct on the Deed of Trust.

reopening the case is problematic insofar as the plan in this case has already been confirmed, and has lasted 56 months. The BA further notes that reopening a case under § 350 is discretionary with the court, and that the burden is on the movants.

Santander also objects to the Nicholsons' Motion, arguing (1) that the Deed of Trust as currently drafted attaches to the real property, (2) that the Deed of Trust can be reformed, and (3) that the doctrine of laches dictates that the Motion must be denied.

### DISCUSSION

A bankruptcy case can be reopened pursuant to 11 U.S.C. § 350(b), "in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." Whether to reopen a bankruptcy case depends on the circumstances of the case and is left to the sound discretion of the bankruptcy court. *Hawkins v. Landmark Fin. Co.*, 727 F.2d 324, 326 (4th Cir. 1984); *In re Hamlett*, 304 B.R. 737, 740 (Bankr. M.D.N.C. 2003).

The court considers two factors when reopening a bankruptcy case, prejudice and ability to prevail. First, the court looks to ensure that no party's rights are prejudiced by actions taken between the case closing and the motion to reopen. *In re Midlands Util., Inc.*, 251 B.R. 296, 299 (Bankr. D.S.C. 2000); *In re Hardy*, 209 B.R. 371, 373-74 (Bankr. E.D. Va. 1997). Second, the court determines "if the underlying cause of action to the Motion to Reopen is 'likely to be sustained when considered on its merits.'" *In re Hardy*, 209 B.R. at 373 (quoting *In re Carter*, 156 B.R. 768, 770 (Bankr. E.D.Va. 1993)). The movant is burdened

with showing that the court has the authority to grant the underlying relief sought. *In re Midlands Util., Inc.*, 251 B.R. at 299.

The instant case cannot be reopened because the Nicholsons have failed to show that to do so would not unfairly prejudice Santander. Santander filed a proof of claim with copies of its Deed of Trust more than seven years ago. The Nicholsons did not object to the claim at any point during their 56-month long case, Santander's mortgage was paid by the Trustee according to the terms of a plan that was proposed by the Nicholsons and confirmed by the court, and Santander's mortgage was pivotal in the Nicholsons stripping Citifinancial's second mortgage through an adversary proceeding due to the lack of equity in their residence. Santander has taken substantial legal action and incurred commensurate expenses since this case was closed in early 2014. Santander has initiated foreclosure proceedings twice, been subjected to a NCDOJ investigation, and defended itself in federal court. Santander's legal actions since this case closed have been premised on its claim as provided for in the Nicholsons' confirmed plan, which went uncontested and was at various points even relied upon by the Nicholsons during the life of the case. In motioning to reopen the case, the Nicholsons have failed to provide any rationale by which Santander's reliance on the facts of this case in taking subsequent legal actions does not constitute prejudice.

Indeed, Santander contends that it would be prejudiced by the reopening of the case for the purpose of revisiting the treatment of its claim during the pendency of the

Nicholsons' case and actions taken subsequently. In its opposition to the Nicholsons' Motion, Santander raises the doctrine of laches—an equitable limitation on initiating legal proceedings—regarding the reopening of the Nicholsons' Chapter 13 case after almost three years. Generally, courts apply the doctrine of laches when a party can show a “(1) lack of diligence by the party against whom the defense is asserted, *and* (2) prejudice to the party asserting the defense.” *Costello v. U.S.*, 365 U.S. 265, 282 (1961) (emphasis added). The burden of proving laches rests with the party asserting the defense. *In re Dean*, No. 10-50773, 2016 WL 3766091, at \*2 (Bankr. M.D.N.C. July 7, 2016) (Citing *In re Ogelsby*, 519 B.R. 699, 704 (Bank. N.D.Ohio 2014)).

The first element of laches, a lack of diligence, depends on the amount of time that passes prior to a party initiating proceedings. The Nicholsons' case was closed on February 26, 2014, and the instant Motion was filed two years and eight months later. The Nicholsons first opposed the validity of Santander's Deed of Trust in filing their administrative complaint with the NCDOJ to forestall foreclosure proceedings in May 2015, 17 months prior to filing the instant Motion. While the Nicholsons' delay meets the first element of laches, delay itself does not constitute prejudice. *In re Bianucci*, 4 F.3d 526, 528 (7th Cir.1993), cited in *In re Dean*, 2016 WL 3766091, at \*3; *see also In re Rising*, No. 07-50123, 2015 WL 393416, at \*2 (Bankr. M.D.N.C. Jan. 8, 2015) (noting the distinction between delay and prejudice in the context of a request to reopen a case).



However, time delay is relevant to determining whether reopening a case is prejudicial to a party to the extent that in meeting the first element of laches through the extraneous passage of time, parties may take subsequent actions that would render reopening a case prejudicial. For instance, the Fourth Circuit ruled that an eight-month delay between closing and reopening a case constituted prejudice because during that time a creditor initiated a foreclosure proceeding based on the valid lien it held that survived the bankruptcy. *Hawkins v. Landmark Fin. Co. (In re Hawkins)*, 727 F.2d 324, 327 (4th Cir. 1984). Santander's reliance on the proceedings throughout the bankruptcy case as well as the conclusion of this bankruptcy case in taking further legal actions is clear, and Santander would certainly be prejudiced as the result of substantial intervening litigation.

Further, the arguments raised in the BA's objection to the Nicholsons' Motion are also well-founded. The court agrees that, given the circumstances presented here, state court is the appropriate forum, with clear jurisdiction, to address the Nicholsons' concerns about the propriety of any foreclosure at this time.

Based upon the foregoing, the court concludes in the exercise of its discretion that the case should not be reopened, and it is hereby **ORDERED** that the Nicholsons' Motion to Reopen is denied.

**END OF DOCUMENT**

PARTIES TO BE SERVED

Jimmy L. Nicholson and Vicki L. Nicholson  
09-50207 C-13

All Creditors and Interested Parties in the Case